United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be Argued by

ARTHUR T. DAVIDSON, M.D. pro se

75-7105

United States Court of Appeals
for the
Second Circuit

ARTHUR T. DAVIDSON, M. D., Plaintiff-Appellant

-against-

LORENZO G. GUZMAN & NICHOLAS GALLUZZI

Defendants-Appellees

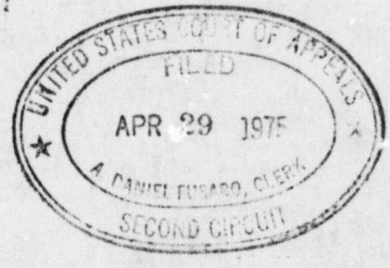
CIVIL ACTION DOCKET NO.

75-7105

B

P/S

BRIEF FOR PLAINTIFF-APPELLANT



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THE PRELIMINARY STATEMENT

This is an appeal by the Plaintiff-Appellant from a judgment rendered on January 28, 1975, in favor of the Defendants- Appellees in an action by the Plaintiff- Appellant for an order prohibiting Defendants-Appellees from terminating Plaintiff-Appellant's employment as Assistant Chief, General Surgery, U. S. Public Health Service Hospital. The matter was heard before Mr. Justice Edward R. Neaher, United Stated District Court, Eastern District of New York.

QUESTIONS PRESENTED

1. Whether business records admitted into evidence in a Federal Court must conform to Federal Statuatory Rule.

2. Whether an unfavorable presumption arises from withheld evidence.

3. Whether a provisional employee can be terminated for exercising his constitutional right of "freedom of speech".

4. Whether the Court erred in not allowing Plaintiff-Appellant to present evidence regarding the subject hospital's standard of health care delivery.

5. Whether there is a violation of the "Equal Protection Clause" of the Fourteenth Amendment if discriminatory treatement is applied to persons under like circumstances and conditions.

6. Whether full and fair cross examination is a fundamental right in our judicial system.

STATEMENT OF FACTS

On December 10, 1974, Plaintiff commenced an action in the United States District Court for the Eastern District of New York seeking to enjoin officials at the United States Public Health Service Hospital in Staten Island, New York, from terminating his employment as an Assistant Chief in the Department of Surgery. At a hearing on December 20, 1974, this motion was denied because the Court felt that Plaintiff failed to demonstrate the irreparable harm would result if it were not granted. However, because of the constitutional questions involved, the Court set the matter down for an immediate trial on January 20, 1975. After a one day postponement, the trial began on January 21, 1975, before the Honorable Edward Neaher. Over the Plaintiff's objections, the Court refused to allow the introduction of any evidence to show the completely deplorable and unacceptable state of affairs that existed at the United States Public Health Service Hospital due entirely to the grossly incompetent direction of the present hospital Director, Nicholas J. Galluzzi, and the present Director of Surgery, Lorenzo G. Guzman. The Court also refused to allow introduction of evidence to show that the quality of medical care delivered by the hospital was below the minimum acceptable community standards; and that there is not a single resident on the General Surgical Service of the U. S. Public Health Service Hospital in Staten Island. This is the only major hospital in the United States that attempts to provide general medical care under such medically unacceptable conditions. The results have been prolonged and unnecessary patient morbidity and needless deaths of patients.

The Court admitted into evidence records that were not business records in that they were not "made in the regular course of any business and that it was the regular course of such business to make it, at the time of the

act, transaction, occurrence or event, or within a reasonable time thereafter."

In an Order dated January 28, 1975, the Court entered judgment in favor of the Defendants. The Memorandum of Decision detailed that testimony of supporting staff personnel found Plaintiff competent and agreeable. However, the Court based its ruling on:

1. Dr. Guzman's personal diary which, in the main, accused Plaintiff of chronic lateness to an 8:00 A.M. conference.

2. Testimony by a physician who only gave anesthesia for one of Dr. Davidson's cases that Dr. Davidson was on an average 20 minutes later in starting his operations than other physicians.

3. Dr. Davidson had minor irregularities in chart completions in twenty-six cases.

Defendants failed to call a single doctor who worked on the ward with Dr. Davidson, to testify that Dr. Davidson had to make rounds before the 8:00 A.M. conference because there was no surgical house staff to perform this duty. Defendants failed to call either of the two anesthetists who gave anesthesia for Dr. Davidson and who had never registered a single complaint against him. Dr. Davidson produced many patients who testified as to the exceptionally high calibre of medical care that he rendered.

SUMMARY OF ARGUMENT

1. Dr. Guzman's 19 page personal summary dated November 19, 1974, (Defendant's Exhibit I) and Dr. Krich's two-days before trial review of charts (Defendant's Exhibit J) were not business records made in the regular course of business and were not work related, therefore, they must be excluded.

2. The failure of Defendants-Appellees to produce evidence within their control and which they naturally should have produced raises an unfavorable presumption, due to the withholding of this evidence, that it would prove unfavorable.

3. Plaintiff-Appellant cannot be terminated for exercising his constitutionally protected right of "freedom of speech."

4. The Court committed a substantial and prejudicial error in ruling that Plaintiff-Appellant could not present evidence showing the subject hospital's unacceptable level of surgical care.

5. There was a gross violation of Plaintiff-Appellant's constitutionally protected rights under the "Equal protection clause" of the Fourteenth Amendment in that discriminatory treatment was applied to him as opposed to others under like circumstances and conditions.

6. The denial by the Court of a meaningful opportunity to Plaintiff-Appellant to fully and completely cross examine a material witness and to afford Plaintiff-Appellant a meaningful opportunity to examine evidence, was a substantial prejudicial error.

POINT I

FEDERAL STATUTORY RULE REQUIRES THAT BUSINESS RECORDS MUST PASS TWO STANDARDS IN ORDER TO BE ADMISSIBLE INTO EVIDENCE

In 1936, the Congress of the United States enacted a statute (now 28 U.S.C. Sec. 1732-a) which states that:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or even if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or withina reasonable time thereafter."
>
> 28 U.S.C. Sec. 1732-a.

The United States passed upon the scope of this Federal statute in Palmer v. Hoffman. In this case, plaintiff sued to recover damages for injuries arising out of a grade-crossing accident. Two days after the accident, as required by the defendant railroad company's rules, the engineer of the train involved reported the circumstances of the accident to an official of the company. His report was reduced to writing and signed by him. The engineer having died before trial, the railroad offered his statement in evidence contending that it was made in the regular course of business, and hence, was admissible by virtue of the statute. The trial court excluded the statement. The Supreme Court affirmed, saying: "B ut we do not think that it (the statement) was made 'in the regular course' of business within the meaning of the Act. The business of the petitioner is the railroad business. That business like other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. ...The engineer's statement which was held inadmissible in this case falls into quite a different category. It is not a record made for the systematic conduct

of the business as a business."

Palmer v. Hoffman, 318 U.S. 109.

The main records admitted into evidence by the Court, over the objections of Plaintiff-Appellant were (1) Dr. Guzman's personal summary and (2) A review of Plaintiff-Appellant's charts by one, Dr. Krich.

As regards Dr. Guzman's 19 paged personal summary dated November 19,1974,(Defendants' Exh. I) this record was not work related nor was it made in the regular course of business. The main thrust of Dr. Guzman's testimony was that Plaintiff-Appellant was chronically late for an 8:00 A.M. conference. Although some of thenotes were alleged to have been made before November 19, 1974, not a single note documented the alleged time of arrival of Dr. Davidson to a single conference. Additionally, Dr. Guzman admitted in open court that at least one-third of these notes could not be remotely regarded as a criticism of Plaintiff-Appellant's performance. Of those that were considered criticism, they were of such minor importance as to include the criticism of the manner in which Plaintiff-Appellant tore open an envelope in order to get to the contents. He never satisfactorily explained how one gets a letter out of an envelope without in some manner tearing the envelope.

The admission of Dr. Krich's evidence, over Plaintiff-Appellant's objections was even a more flagrant violation of the Federal Rules of Evidence. Indeed, this evidence (Defendants' Exh. J) was specifically manufactured two days before the trial. Additionally, Dr. Krich's testimony in all other regards was perjurous and with malice.

POINT II

PRESUMPTION ARISING FROM WITHHOLDING EVIDENCE

An unfavorable inference may arise when a party fails to produce evidence which is within his control and which he is naturally expected to produce. It is logical to infer that the evidence is withheld because it would prove unfavorable.

Armory v. Delamirie, 1 Strange (K.B.) 505.

One of the major factors in Judge Neaher's opinion was the testimony by Dr. Krich of Plaintiff-Appellant's alleged chronic tardiness to start operations which "seriously disrupted operating schedules, alarmed patients and frequently required the postponement of surgery."

The indisputable fact, which was known to opposing counsel, was that Dr. Krich gave anesthesia in only one instance, out of approximately 100 major cases for Plaintiff-Appellant. This particular case happened to be an emergency which occurred during the late afternoon and required several hours to get the patient ready for a major operative procedure. Almost all of the other cases were given by two anesthetists; one of whom, as admitted by Dr. Krich under cross examination, never had a single complaint about the excellent manner in which Dr. Davidson worked with the other members of the operating team, including the anesthetist, and spent a short time pre-operatively properly preparing the patient for the psychic trauma of major surgery. The other anesthetist stated, the following day after learning of Dr. Krich's testimony, that he had no recollection of making a single complaint to Dr. Krich about the excellent and highly competent manner in which Plaintiff-Appellant worked in major operative cases withthe entire operative team and his insistence that all safety precautions which included the pre-operative checking by means of x-ray, EKG, and other laboratory means, were done and on the chart before the patient

was put to sleep. This insistence by Plaintiff-Appellant to the highest University Standards of sugical care--pre-pperative, operative, and post-operative--were reflected in the excellentresults that Plaintiff-Appellant obtained on his patients. This was in marked contrast to the poor and grossly negligent results obtained by Dr. Guzman and the other surgeons which were far below the minimum community standards and resulted in needless and preventable patient morbidity and mortality. Indeed, one of the, if not the main reason for the abrupt termination of Plaintiff-Appellant's employment was his official documentation and formal presentations of three cases ofneedless deaths and morbidity by Dr. Guzman whichonly represented a fraction of the preventable sicknessand needless deaths caused by his gross incompetence and his addiction to narcotics.

Both of the two anesthetists that gave anesthesia for Dr. Davidson and whose testimony would have proven Dr. Guzman and Dr. Krich to be perjurers were on duty at the hospital at the time of the trial and could have been subpoenaed to supply the truthful facts. The fact that they gave anesthesia was known to Defendants-Appellees because their names were listed on each chart as nurse anesthetist.

The mere non-production of any witness is not sufficient to serve as the basis for an unfavorable inference; the witness must be one whom the party would naturally be expected to call. To meet this requirement, the witness must be within the power of the party to produce, which one case has construed to mean "at hand and subject to a subpoena".

Reehil v. Fraas, 114 N.Y.S. at 19.

POINT III

HOSPITAL'S ACTION VIOLATION OF FIRST AMENDMENT "FREEDOM OF SPEECH" CLAUSE

The standard of medical care, particularly on the General Surgical Service, at the U. S. Public Health Service Hospital, had declined precipitously under the directorship of Defendants-Appellees. Plaintiff-Appellant voiced frequent criticism against the level of surgical care and the lack of trained personnel, specifically, Surgical Residents on the General Surgical Service.

The chronology of events relative to the termination of Plaintiff-Appellant's employment clearly demonstrates that the decision of termination was based wholely or in part on his outspoken criticism of the hospital, particularly the General Surgical Service.

Such actions are a clear violation of the constitutionally guaranteed right of the "Freedom of Speech" clause of the First Amendment. The Courts have uniformly held that the slightest infringement of this right is to be vigorously resisted.

Under federal law, the right to remain in a provisional post is similar to a teacher's right to achieve tenure, which is actionable in a federal court if there is (1) denial of First Amendment rights, (2) infringement of a property interest under the Fourteenth Amendment, or (3) deprivation of liberty under the Fourteenth Amendment.

Perry V. Sindermann, 408 U.S. 593 (1972)

Board of Regents v. Roth, 498 U.S. 564 (1972)

In New York Times Co. v. Sullivan, the U. S. Supreme Court held that neither: (1) factual error nor; (2) defamatory content suffices to remove the constitutional shield from criticism of official conduct. Indeed, the

combination of the two is also inadequate to remove this First Amendment right.

New York Times Co. v. Sullivan, 376 U.S., 255.

POINT IV

COURT'S RULING PREVENTING PLAINTIFF-APPELLANT FROM PRESENTING EVIDENCE RE: HOSPITALS UNACCEPTABLE LEVEL OF SURGICAL CARE--A SUBSTANTIAL PREJUDICIAL ERROR

The major factors in the court's decision to render judgment in favor of Defendants-Appellees were chronic tardiness by Plaintiff-Appellant to an 8:00 a.m. conference; chronic tardiness--an average of twenty minutes later than other physicians--in starting surgical operations and chart incompleteness.

The Court, over Plaintiff-Appellant's objections refused to allow the introduction of evidence to show the reasons for the lateness of Plaintiff-Appellant to this conference. The facts are that The U.S. Public Health Service Hospital, Staten Island, New York in former years was a very good medical establishment. However, since approximately 1967, the quality of medical care has decined precipitously until at present it is below the minimum acceptable community standards. The Hospital Intern Group is two-thirds Osteopathic or foreign trained doctors.

An equally as great tragedy is the fact that there is not a single resident on the General Surgical Service of the U.S. Public Health Service Hospital in StatentIsland. This is the only major hospital in the United States that attempts to provide general medical care under such medically unacceptable conditions. The results have been prolonged and unnecessary patient morbidity and needless deaths of patients.

This deplorable state of affairs is due entirely to the grossly incompetent direction of the present hospital director, Nicholas J. Galluzzi, and the present Director of Surgery, Lorenzo G. Guzman.

On numerous occasions, Plaintiff-Appellant had conferred with Nicholas J. Galluzzi in regards to improving this intolerable state of affairs. Dr. Galluzzi's reply has been that his primary job is not to disturb Washington and to do the best we can under the circumstances. He suggested that I get on this wave length.

Dr. Lorenzo G. Guzman is an even more pathetic figure. He had a diagnosis of cancer of the lymph node made on him some time ago. He suffers from other chronic medical conditions and requires constant sedation with narcotics.

The other services are equally as bad. There is no female nurse assigned to the Breast Clinic to aid in the care of female breast cases. This is totally unacceptable.

The X-ray Department is unable or unwilling to perform mammographies. This is below community medical standards. Indeed prior to Plaintiff-Appellant's appointment at the hospital, mammographies were not done on the female patients in whom breast cancer was suspected. Plaintiff-Appellant arranged to have these services done at Doctors Hospital, Staten Island, New York.

All other major general hospitals in the Metfopolitan New York area performing major surgical operations have a minimum four or five-year training program with four to eight Surgical Residents at each level which gives twenty to thirty Surgical Residents to the General Surgical Service of each hospital. As has been stated, the unbelievable state of affairs was that there was not, and still is not a single Surgical Resident on the entire General Surgical Service of the U.S. Public Health Service Hospital at Staten Island, NewYork. Because of this total absence of a Surgical Residents Program, Plaintiff-Appellant was forced to perform many duties that normally would be relegated to residents in their first, second, third, fourth, or fifth year of training. Plaintiff-Appellant's primary obligation and responsibility was to provide good

surgical care to the patients. This required Plaintiff-Appellant to make daily ward rounds at 7:00 to 7:30 A.M. This function is universally left in all other hospitals to the surgical house staff, which was non-existent in U.S. Public Health Service Hospital.

Additionally before Plaintiff-Appellant would allow a single patient to be put to sleep for a major operation, he required that every parameter be checked and recorded on the chart. If there was a single abnormal laboratory finding which might adversely affect the health of the patient , Plaintiff-Appellant would require that this value be rechecked. This is the minimum acceptable procedure, preoperatively, in all major hospitals in the Metropolitan New York area.

Rule 43 of the Rules of Procedure in the Federal Courts requires that:

> "All evidence shall be admitted which is admissible under statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held."
>
> Rule 43, Federal Rules of Civil Procedure.

POINT V

THE ACTIONS OF DEFENDANTS-APPELLEES ARE A VIOLATION OF THE "EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT"

The "Equal Protection Clause"of the Fourteenth Amendment is a guaranty that all persons shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed.

> U.S.--State of Louisiana ex rel, Francis v. Resweber, La., 329 U.S. 459.

Testimony at trial brought out the fact that 100% of the doctors were late to the 8:00 a.m. conference. Dr. Guzman himself was often late,

and missed many conferences due to his major chronic illness, requiring heavy narcotic sedation.

In the matterof chart irregularities, 100% of the doctors had chart irregularities and were required to go to "the central discharge unit to complete these charts." This fact was admitted by Dr. Guzman in his testimony at trial.

Plaintiff-Appellant always promptly completed his charts. This was in marked contrast to the other Attending Physicians most of whom had a back-log of 40 to 50 charts that were incomplete

POINT VI

PLAINTIFF-APPELLANT WAS DENIED THE OPPORTUNITY TO FULLY CROSS EXAMINE IMPORTANT WITNESSES AND TO EXAMINE EVIDENCE INTRODUCED BY DEFENDANTS-APPELLEES

Cross examination of adverse witnesses is a matter of right in every trial of a disputed issue of fact.

Friedel v. Board of Regents, 296 N.Y. 347.

The right to cross examine is basic in our judicial system.

Alford v. United States, 282 U.S. 687.

The Court's decision was based primarily on the perjurous testimony of Dr. Krich. In the matter of the so-called documentation of the fact that Plaintiff-Appellant was twenty minutes later starting his operations that other physicians was manufactured evidence, fathered by Dr. Krich during the 48-hour period before his testimony. After giving his testimony in the late afternoon, he informed the court that he would not be available the following day. The Court excused Dr. Krich from further appearance. Defendant-Appellant was therefore denied his most fundamental constitutional right of fully and completely cross examining Dr. Krich. Additionally, the review of the approximately 100 charts was solely the unsupported testimony of Dr.

meaningful
Krich. No/opportunity was provided Plaintiff-Appellant to make an independent review of these findings to see if indeed they were correct, therefore, the entire testimony of Dr. Krich as well as his so-called evidence (Defendants Exhibit J).

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court reverse the judgment of Mr. Justice Edward R. Neaher of the United States District Court Eastern District of New York.

In the alternative, it is respectfully requested that the subject judgment be vacated and a new trial be ordered.

Dated: Brooklyn, New York
April 24, 1975

Respectfully submitted,

ARTHUR T.DAVIDSON, M. D. pro se
Attorney for Plaintiff-Appellant

Arthur T. Davidson, M. D. pro se
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR T. DAVIDSON, M. D.,

Plaintiff-Appellant

-against-

LORENZO G. GUZMAN & NICHOLAS GALLUZZI

Defendants-Appellees

CIVIL ACTION DOCKET

NO. 75-7105

APPENDIX

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1. Brief for Plaintiff-Appellant
2. Docket Entries
3. Index on Appeal
4. Judgment of United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

ARTHUR T. DAVIDSON,

Plaintiff-Petitioner,

-against-

LORENZO G. GUZMAN, NICHOLAS GALLUZZI, EDWARD HINMAN, and CHARLES C. EDWARDS,

Defendants-Respondents.

- - - - - - - - - - - - - - - - - - - -x

74 C 1723

MEMORANDUM OF DECISION

APPEARANCES:

ARTHUR T. DAVIDSON,
Plaintiff pro se

DAVID G. TRAGER, ESQ.
United States Attorney,
Eastern District of New York
For Defendants Lorenzo G. Guzman and Nicholas Galluzzi[1]
By PAMELA C. McGUIRE, ESQ.
Assistant United States Attorney

NEAHER, District Judge.

Plaintiff Arthur T. Davidson, a licensed physician and surgeon, originally brought this action pro se to prohibit defendants from terminating his employment as an assistant chief of the department of surgery in the United States Public Health Service Hospital, Staten Island, New

York. Jurisdiction is based on 28 U.S.C. §§1346 and 1361. Plaintiff is also a June 1974 graduate of the St. John's University School of Law and he conducted the proceedings throughout except for his direct examination at trial, for which he engaged Arthur L. Pulley, Esq., at the suggestion of the court.

Plaintiff's application for preliminary injunctive relief was denied after a hearing on December 20, 1974, for lack of a sufficient showing of irreparable injury. An expedited trial date was set for January 21, 1975. In the interim, plaintiff's employment was terminated and prior to trial he filed an amended complaint seeking reinstatement and back pay. That trial has taken place and the following are the court's findings of fact and conclusions of law as required by Rule 52, P.R.Civ.P.

Plaintiff, who is now 51 years of age, received his M.D. degree from Howard University College of Medicine in 1945. After completing his internship and residencies in general surgery at hospitals in New York and Washington, D.C., he served as a medical officer in the United States Army during the Korean war. Thereafter he was certified

as a specialist in general surgery by the American Board of Surgery. After periods of teaching and research, he engaged in the New York area in the practice of general and traumatic surgery and obtained appointments to the faculty of the Albert Einstein Hospital College of Medicine and the Downstate Medical School, as well as staff appointments at other New York hospitals. He is a member of the American Medical Association, the National Medical Association, and the Medical Society of the County of New York. He has published papers in various medical journals and delivered a paper on original cancer research, in which he is engaged, at the annual meeting of the National Medical Association in July 1974.

In March 1974, plaintiff applied for appointment as a medical officer in the United States Public Health Service Hospital, Staten Island, New York. He received such an appointment on March 11, 1974, on the recommendation of the defendant Dr. Lorenzo C. Guzman, chief of surgery at the hospital. He entered duty on a one-month temporary basis in order to provide time to process his papers through the United States Civil Service Commission. On March 31, 1974 plaintiff's temporary appointment was converted to a

career-conditional appointment, which was subject to the satisfactory completion of a one-year probationary period commencing March 11, 1974.

On December 6, 1974, within the one-year probationary period, plaintiff was notified that his employment at the hospital would be terminated effective December 20, 1974. This notice was given to him by the defendant Dr. Nicholas J. Galluzzi, director of the hospital, in the form of a letter dated December 4, 1974 (Defendants' Exh. D). The reason given for the termination was "failure to meet the performance requirements of your position," which was specified in some detail in the termination letter under the general headings of chronic tardiness, inability to work harmoniously with colleagues, within and outside the Department, poor interpersonal relationships, and disregard of Department and Hospital routines and regulations.

The ultimate issue to be decided at trial was whether the real reason for plaintiff's dismissal was not a failure of performance on his part but his exercise of first amendment rights in criticizing the quality of surgical care at the hospital and the performance of Dr.

Guzman as chief of the surgery department. That criticism was expressed in a letter dated November 8, 1974, which plaintiff had written to Dr. Calluzzi commenting upon Dr. Guzman's performance as director of the general surgical service and citing incidents which reflected upon Dr. Guzman's conduct professionally (Defendants' Exh. E).

The defendants have taken sharp issue with plaintiff's allegations and contentions on the merits and also raise the question of the court's jurisdiction. Taking up that question first, the Supreme Court has made it clear that the judiciary should be slow to intrude in federal personnel decisions, particularly where probationary employees are concerned. Sampson v. Murray, 415 U.S. 61, 83-84 (1974), 94 S. Ct. 937, 948. But in that case the Court also pointed out that the courts are not "wholly foreclosed [from] the granting of preliminary injunctive relief in such cases . . . ." Id. at 84. Such relief might well be appropriate and essential where a threatened or executed dismissal was solely motivated by an impermissible reason, such "as a reprisal for the exercise of constitutionally protected rights." Ring v. Schlesinger, 502 F.2d 479, 490 (D.C. Cir. 1974).

After hearing the evidence of the parties in this case, however, the court is satisfied that plaintiff's termination was not for the reason he claims and that no relief is warranted. His burden of persuasion was not met by the mere chronological time sequence between his November 8 letter of criticism (Defendants' Exh. E) and the termination notice of December 4 (Defendants' Exh. D). While without more that sequence of correspondence might have warranted an inference of probable cause and effect, the evidence was not left in that balance. Nor was the balance tipped in plaintiff's favor by the testimony of a few satisfied patients or that of supporting staff personnel who found him competent and agreeable. With due regard for Dr. Guzman's interest in the outcome, his testimony that he informed plaintiff on November 6 — two days before the November 8 letter — that his termination was imminent must be accepted as credible because of the convincing array of documented proof offered by defendants and medical and staff colleagues. This proof revealed that plaintiff's own deficiencies in performance had been the subject of complaints and admonitions dating back to a few weeks after his arrival and was having serious effect upon the hospital's essential procedures.

To cite but a few examples, Dr. Leonard B. Krich, deputy chief of anaesthesiology, who daily attended the operating rooms to arrange for anaesthesia of patients awaiting surgery, testified that plaintiff's frequent and unusual lateness for operations seriously disrupted operating schedules, alarmed patients and frequently required the postponement of surgery. Dr. Krich reviewed all copies of anaesthesia records from March through November 1974 for operative cases scheduled for plaintiff. A summary reflecting this review (Defendants' Exh. J) showed that of a total of 70 cases, 37 started more than 20 minutes late. Plaintiff was late 52% of the time for an average of 44 minutes, ranging from 25 minutes to 2 Hours and 25 minutes. In one case (not included in the summary) on November 15, 1974, he was 3 hours and 45 minutes late. Dr. Krich also testified that plaintiff's cursory, uninformative chart notes and failure to be available for pre-operative discussions often delayed the work of the anaesthesiologists and created problems during surgery.

Dr. Guzman testified that plaintiff's chronic lateness was observed from the outset and prompted him to frequently admonish plaintiff and eventually to maintain

notes as more and more complaints came in from doctors, nurses and patients. His summary consisting of 19 pages was appended to a preliminary memorandum to Dr. Galluzzi dated November 19, 1974 (Defendants' Exh. I). The summary, however, chronologically records incidents and conferences between plaintiff and Dr. Guzman dating back to March 27, 1974 and continuing throughout the months of May, June, July, August, September, October and November — all prior to plaintiff's November 8 letter. All of the incidents narrated were clearly work-related and would justify the administrative action taken.

Dr. Guzman also testified to his review of medical charts of patients under plaintiff's care. His review was reflected in a memorandum (Defendants' Exh. G) showing that in 26 cases plaintiff failed to note essential information as required by hospital and surgical department regulations. The testimony of Dr. Krich, Dr. Stephen P. Bartok, chief of radiotherapy and nuclear medicine, Dr. Kok Kong, medical officer in surgery and gynecology, and Nurses Coviello and Keohane, who had charge of operating suites and recovery room attendance, clearly pointed out the serious consequences of plaintiff's chart irregularities. Such evidence makes

it impossible to reach any other conclusion than that plaintiff's dismissal was not based upon an impermissible reason.

Plaintiff's complaint is dismissed on the merits.

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of the defendants dismissing the complaint.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, N.Y.
January 28, 1975

F O O T N O T E

[1] Defendants Edward Hinman and Charles C. Edwards, officials of the Department of Health, Education and Welfare, Washington, D.C., were dropped at plaintiff's request at trial.

STATE OF NEW YORK, COUNTY OF KINGS ss.:

The undersigned, an attorney admitted to practice in the courts of New York State, pro se

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☒ Attorney's Affirmation — pro se shows: deponent is Arthur T.Davidson, M.D., pro se the attorney(s) of record for Plaintiff-Appellant in the within action; deponent has read the foregoing Brief for Plaintiff-Appellant and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

INFORMATION AND BELIEF

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: April 23, 1975

Arthur T. Davidson, M.D. pro se
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — Arthur T. Davidson, M.D. pro se being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF KINGS ss.:

Arthur T. Davidson, M.D. pro se being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 629 Eastern Parkway, Brooklyn, N. Y.

Check Applicable Box

☒ Affirmation of Service By Mail — On April 23 1975 deponent served the within Brief for Plaintiff-Appellant upon Pamela C. McQuire attorney(s) for Defendant-Appellees in this action, at 225 Cadman Plaza E., Brooklyn, N.Y. the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

The name signed must be printed beneath

Arthur T. Davidson, M.D., pro se

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for
Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,

Attorney for
Office and Post Office Address

To

Attorney(s) for

~~ERROR~~ 75-7105 Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR T. DAVIDSON, M.D.,

Plaintiff-Appellant

-against-

LORENZO G. GUZMAN & NICHOLAS GALLUZZI

Defendants- Appellees

BRIEF FOR PLAINTIFF-APPELLANT

ARTHUR T. DAVIDSON, M. D. pro se

Attorney for Plaintiff-Appellant

Office and Post Office Address, Telephone

629 Eastern Parkway
Brooklyn, N. Y.
(212) 756-1708

To Pamela C. McGuire, Esq.
225 Cadman Plaza East, Brooklyn, N.Y.

Attorney(s) for
Defendants-Appellees

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for